2-2-1976

Edward T. Bowles v. Commonwealth of Kentucky

Appellant's Brief 1975-SC-1106

KYSC1975-SC-1106-01
{478CD5E3-ED82-47DC-9211-F240022BEB2F}
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APPELLANT'S BRIEF

3824

SUPREME COURT OF KENTUCKY

FILE NO. 75-1106

EDWARD T. BOWLES — APPELLANT

VS. — APPEAL FROM FAYETTE CIRCUIT COURT
HON. ARMAND ANGELUCCI, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed to the Hon. Armand Angelucci, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507; Hon. Patrick H. Molloy, Commonwealth Attorney, 22nd Judicial District, Lexington, Kentucky 40507; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601 this 26th day of January, 1976.

Larry H. Marshall

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MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

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DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE THE PROSECUTION'S ONLY EVIDENCE OF GUILT WAS THE UNCORROBORATED TESTIMONY OF TWO ACCOMPLICES?

II.

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III.

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STATEMENT OF THE CASE

On March 17, 1975, a two-count indictment was returned in the Fayette Circuit Court, jointly charging Appellant, George Thomas Peterson (Appellant's codefendant), and Carlethia Nell Majors with murder and first degree robbery in violation of KRS 507.020(1) and KRS 515.020(1)(b), respectively (Transcript of Record, hereinafter T.R., p. 3). The indictment alleged that the above-named defendants, along with Derrick Winston Clark, a juvenile, robbed and killed one William A. Brown (Id.). This indictment was amended on April 7, 1975, as to Appellant, charging him with being a persistent felon (T.R., p. 82).

On April 2, 1975, Appellant's counsel filed a motion for a separate trial (T.R., p. 16), and on April 4, 1975, Appellant's counsel moved to suppress any statement made by Appellant (T.R., p. 19). At a suppression hearing held on April 8, 1975, the trial court ruled that the alleged statement of Appellant was admissible (Transcript of Suppression Hearing, hereinafter T.S.H., p. 33). The court failed to rule on the separate trial motion, although it was raised at the suppression hearing (T.S.H., p. 9).

Contrary to his plea, Appellant on April 23, 1975 was convicted and sentenced to twenty years confinement on the first degree robbery charge, and ten years confinement, not for murder, but for manslaughter in the second degree (T.R., p. 103). However, the judgment, entered on April 23, 1975, erroneously stated that Appellant was sentenced to twenty years for murder and ten years for robbery in the first degree (T.R., p. 94). The court did order that the sentences run consecutively (Id.). On April 28, 1975, Appellant filed his Notice of Appeal (T.R., p. 104).

On July 23, 1975, the Commonwealth Attorney moved to dismiss the original indictment returned on March 17, 1975 (T.R., pp. 111-112). On this same day, the said motion was sustained (T.R., p. 113).

ARGUMENTS

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE THE PROSECUTION'S ONLY EVIDENCE OF GUILT WAS THE UNCORROBORATED TESTIMONY OF TWO ACCOMPLICES.

According to the charges in the indictment, Appellant on or about January 25, 1975, in Fayette County, Kentucky, killed and robbed one William A. Brown (T.R., p. 3).

In an effort to prove the charged offenses, the prosecution called twenty witnesses to the stand; twelve of the witnesses, however, offered no evidence to connect Appellant with the killing or robbery, two witnesses were accomplices as a matter of law, and the other eight witnesses' testimony was insufficient to corroborate that of the accomplices.

The first witness called to the stand by the prosecution was Barbara Lynn Brown, the wife of the victim. All that she was able to tell the jury was that the deceased had just been paid $304.00 on Friday, the day before he was killed (Transcript of Evidence, hereinafter T.E., Vol. I, p. 69).

The next prosecution witness, Officer Phillip Segar, testified that he responded to a call at 104 West Sixth Street at 7:15 P.M. (T.E., Vol. I, p. 72). Once he went inside the building, he "observed the victim on the floor" (T.E., Vol. I, p. 73).

Detective Raymond Chappell was the next prosecution witness. He testified that he arrived at the scene between 7:30 and 7:50 on January 25, 1975 (T.E., Vol. I, p. 79). Also be described the apartment where the fatal shooting occurred, and the position of the victim's body on the floor (T.E., Vol. I, p. 80).

Next came Officer Robert Hutchinson for the prosecution. His testimony was that he "went to the Cunningham Funeral home about 10:30" on the night of the shooting "to take photographs and collect any physical evidence" that may have been present on the victim (T.E., Vol. I, p. 92).

Really the first witness of any import was Derrick Winston Clark. Only sixteen, Clark pleaded guilty to armed robbery and accessory to murder in juvenile court (T.E., Vol. I, p. 106). He testified that he had known Appellant about a week before Brown was killed (T.E., Vol. I, p. 109). He further stated that he met Appellant on Saturday, January 25, 1975 at about "12:00 or 1:00 P.M." (T.E., Vol. I, p. 110), and they went to the Third Street Grill (T.E., Vol. I, p. 114), in George Peterson's - Appellant's codefendant - car (T.E., Vol. I, p. 115). While at the grill, Clark, because he was broke, suggested that he and Appellant should rob somebody (T.E., Vol. I, p. 117). According to the further testimony of Clark, he and Appellant then went to 104 West Sixth Street to get "another gun" (T.E., Vol. I, p. 148). Upon arriving at the apartment on Sixth Street, Clark took the .32 snub-nose gun that was in the car and gave it to Appellant (T.E., Vol. I, p. 121). Once inside the apartment, Clark testified that Appellant and Peterson went upstairs (T.E., Vol. I, p. 122), and when they came down, codefendant Peterson gave Clark a .38 caliber gun and a long raincoat to wear (T.E., Vol. I, p. 123). When Clark and

Appellant left the apartment, they proceeded to the corner of Sixth Street to wait on their intended victim (T.E., Vol. I, p. 128). It was at this point that Clark testified that he and Appellant traded guns so Appellant now had the .38 revolver (T.E., Vol. I, p. 130); however, no one saw Clark switch guns with Appellant (T.E., Vol. I, p. 149). Finally, when the deceased and Carlethia Majors showed up, Clark testified that Appellant grabbed the deceased and asked for the money, but when the deceased reached in his pocket "like he was going to pull out a gun," Appellant "just shot him" (T.E., Vol. I, p. 131).

Carlethia Majors was the next prosecution witness. She was originally indicted with Appellant; however, she pleaded guilty to aiding and assisting the commission of robbery in the first degree and received a sentence of fifteen years (T.E., Vol. II, p. 169). Having been out of circulation for some time due to the fact that she had been in the hospital, Carlethia was looking for a little action. She testified that once she was released from the hospital on January 25, 1975, she went to Marietta Galashaw's apartment on McCracken Drive (T.E., Vol. II, p. 195); and then in the company of the Galashaw sisters, Lucille and Marietta, and codefendant Peterson proceeded to her apartment located at 104 West Sixth Street (T.E., Vol. II, p. 196). While taking out the garbage at her apartment, Majors testified that she met the deceased (T.E., Vol. II, p. 198), and promptly four of them - Majors, Lucille, the deceased, and a "dude" - proceeded to the Third Street Grill (T.E., Vol. II, p. 199), where they arrived at about 2:30 P.M. (T.E., Vol. II, p. 200). When Appellant showed up at the grill, she already knew that Brown had a lot of money on him because Brown "was showing it" (T.E., Vol. I, p. 174); therefore, she testified that

she asked Appellant "did he want to make some money" and "showed him William Brown" (T.E., Vol. II, p. 175). This happened about 6:30 P.M. (T.E., Vol. II, p. 215). Carlethia further testified that she, Lucille, and the deceased left the grill about 7:00 P.M. to go back to the apartment on Sixth Street (T.E., Vol. I, p. 176). Carlethia then testified that as she and the deceased were walking toward the apartment, Appellant and Clark "grabbed William Brown and told him to empty his pockets"(T.E., Vol. II, p. 179). Although she could not see who actually shot Brown (T.E., Vol. II, p. 180), the one wearing the "long coat with light gray in it" pulled the trigger (T.E., Vol. II, p. 192). Finally she testified that she took the money from the victim's pocket (T.E., Vol. II, p. 181), which amounted to $235.00 (T.E., Vol. II, p. 206), and while she gave some of the money to codefendant Peterson, she never gave any money to Appellant (T.E., Vol. II, p. 189).

The next prosecution witness was William Fry who testified that while on his way to the liquor store he "saw two fellows have a man and shove him in a doorway" (T.E., Vol. II, p. 222), and the one in a long gray coat shot the man (T.E., Vol. II, p. 229).

Lucille Galashaw was the next prosecution witness. All she was able to offer the jury was that the other "dude" that accompanied Carlethia, the deceased, and herself to the Third Street Grill was a guy named Benny (T.E., Vol. II, p. 233). Lucille further testified that she saw Appellant, who was wearing a black leather coat, at the Grill in the company of Clark (T.E., Vol. II, p. 234), and that Appellant took her back to the Sixth Street apartment to get her kids (Id.). Finally she stated that when she, Majors, and the deceased returned to the apartment, she saw no one in the

corner waiting to rob the deceased (T.E., Vo. II, p. 243), and Carlethia Majors came in after the shot was fired (T.E., Vol. II, p. 237).

Marietta Galashaw was then called to the stand by the prosecution. Marietta (Molly) testified that Appellant and Clark came to the apartment on Sixth Street around 6:00 P.M. (T.E., Vol. II, p. 265), and Appellant and Peterson went upstairs (Id.). Once back downstairs, Peterson gave Clark a gun (T.E., Vol. II, p. 266), and a long beige trench coat (T.E., Vol. II, p. 268).

Teresa Barnes then testified that Appellant, wearing a "black leather jacket" (T.E., Vol. III, p. 308), came by her apartment located at 527-A Aspendale Drive (T.E., Vol. III, p. 302), on January 25, 1975, around "7:00 or ten after 7:00" (T.E., Vol. III, p. 306), and stayed until 8:15 P.M. (T.E., Vol. III, p. 307).

The next series of witnesses called by the prosecution just established the chain of evidence of the .38 caliber gun, found at McAlpins (T.E., Vol. III, p. 318), on February 10, 1975 (T.E., Vol. III, p. 337).

The deposition of Dave Williams established that this gun fired the bullet that killed the deceased (T.R., p. 30).

The next two witnesses for the prosecution just established the integrity of the bullet removed from the deceased. The autopsy performed by Dr. Paul Young showed that the bullet went through the deceased's heart (T.E., Vol. III, p. 348).

The last witnesses for the prosecution were Detectives William Fryer and William C. Linnean. They established that Appellant was arrested at 9:00 A.M. on January 30, 1975 at 527-H Aspendale (T.E., Vol. III, pp. 353, 370), and that Appellant said "That old man couldn't see nothing; he was too drunk" (T.E., Vol. III, pp. 355, 372).

At that point in the trial, the Commonwealth rested (T.E., Vol. III, p. 386).

At the conclusion of the Commonwealth's case in chief, Appellant's counsel moved the court below to direct a verdict of acquittal because the prosecution failed to corroborate the testimony of the accomplices (T.E., Vol. III, p. 387). This motion was overruled (T.E., Vol. III, p. 388).

The Appellant's defense was that of an alibi. Rosemary Barnes, mother of Donna and Teresa, testified that Appellant, wearing a long black leather coat (T.E., Vol. III, p. 390), came by her house on January 25, 1975 at 6:30 P.M. (T.E., Vol. III, p. 389), and left about 6:45 P.M. (T.E., Vol. III, p. 390). Also Teresa Barnes again testified that Appellant came by her house around 7:10 P.M. (T.E., Vol. III, p. 398).

Appellant also took the stand in his own defense. He testified that he went to the apartment on Sixth Street to get his brown hat and a gun (T.E., Vol. III, p. 411); however, Clark took the gun (T.E., Vol. III, p. 412). He and Clark then proceeded to the home of Clark's mother (Id.). After purchasing beer for Clark's mother, he and Clark parted company (Id.). From there Appellant said he began looking for Donna Barnes, and tried both her mother's house at 6:30 P.M. (T.E., Vol. III, p. 413), and then Teresa's house (Id.). Finally, he said that the statement he made to the police was "Not any old man can identify me because I didn't do nothing for the old man to see" (T.E., Vol. III, p. 418).

Codefendant Peterson also took the stand in his own defense. He testified that Appellant came by the Sixth Street apartment for the third time, and Appellant said "Get me a piece" (T.E., Vol. IV, p. 468). However, Clark took the gun (T.E., Vol. IV, p. 469), and a "cream, beige

type of a topcoat" (T.E., Col. IV, p. 470). Also Peterson testified that he heard a man saying "I ain't got nothing" and then he heard a shot (T.E., Vol. IV., p. 476). Finally, since codefendant Peterson took the stand, his confession implicating Appellant in the charged offenses was admitted into evidence (T.E., Vol. IV, p. 513). The substance of the confession was that Appellant said he knew where he could get $400.00 (T.E., Vol. IV, p. 513), and that Appellant said that he had to shoot Brown because he thought Brown was going to shoot him (T.E., Vol. IV, p. 533).

Once the defense announced closed (T.E., Vol. IV, p. 539), the prosecution called Detectives Fryer and Linnean in rebuttal to reemphasize what codefendant Peterson said in his confession (T.E., Vol. IV, p. 551, 563).

Again Appellant's counsel moved for a directed verdict (T.E., Vol. IV, p. 559). However, it was overruled by the trial court (Id.).

Appellant submits that since the testimony of Derrick Winston Clark and Carlethia Majors was not sufficiently corroborated, the court below erred by overruling trial defense counsel's motion for a directed verdict. Initially it should be noted that both Clark and Majors were accomplices as a matter of law (T.E., Vol. IV, p. 589).

Because the possibility always exists that an accomplice will falsify his testimony and will incriminate an innocent party in an effort to secure more favorable treatment for himself, the reliability of an accomplice's testimony is inherently suspect. Consequently, under the rules of modern practice, a conviction based solely upon the testimony of an accomplice will not stand. Commonwealth v. Bowling, Ky., 497 S.W.2d 720 (1973). This principle of law is embodied in RCr 9.62, which reads as follows:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

The corroborating evidence required by RCr 9.62 should tend to connect the accused with the commission of the offense. Hopper v. Commonwealth, Ky., 419 S.W.2d 756 (1967). "Evidence sufficient for such corroboration should be of such nature and character as to inspire belief in a reasonable and unprejudiced man that it points toward guilt and links up with the principal fact under investigation." Benge v. Commonwealth, Ky., 476 S.W.2d 618, 620 (1972). Otherwise stated, the requirement of RCr 9.62 is met if the corroborative evidence is of such quality that a reasonable and unprejudiced mind can conclude that it tends to establish some fact that links the accused up with the principal fact of the commission of the offense. Bowling, supra; Flora v. Commonwealth, Ky., 387 S.W.2d 15 (1965).

The type of evidence required to corroborate an accomplice's testimony must be of sufficient integrity to independently give a "ring of truth" to the accomplice's allegations of the defendant's guilt. Bowling, supra, at 721.

In the case sub judice, there was no sufficient corroborative evidence, of a competent nature, that tended to connect the accused with the commission of the offenses charged in the indictment.

It cannot be argued that the statement attributed to Appellant - "That old man couldn't see nothing; he was too drunk" (T.E., Vol. III, p. 355) - was sufficient to

corroborate the testimony of the two accomplices. Nothing can be read into this statement tending to connect Appellant with the commission of the charged offenses. Further, Appellant testified that his statement - ". . . I didn't do nothing for the old man to see" (T.E., Vol. III, p. 418) - was in response to the statement by one of the detectives to the effect that an old man can identify you (Id.). But irregardless of what was said, the statement falls short of corroboration since it "is susceptible of various interpretations, most of them as consistent with an innocent proclamation as with an incriminating one." Creech v. Commonwealth, Ky., 412 S.W.2d 245, 246 (1967).

Neither can it be argued that the testimony that Appellant was with Clark throughout the day was sufficient corroboration. This Court has on numerous occasions held that the fact the accused had been with the accomplice shortly before and after the crime was insufficient corroboration. See Walker v. Commonwealth, Ky., 472 S.W.2d 477 (1971); Goodhue v. Commonwealth, Ky., 415 S.W.2d 845 (1967); Hartsock v. Commonwealth, Ky., 382 S.W.2d 861 (1964).

Finally, it cannot be argued that the testimony and confession of codefendant Peterson were sufficient corroborative evidence. Codefendant Peterson was, himself, an accomplice; therefore, his testimony needed corroboration [see Argument II]. Further, his confession was not only from that of an accomplice, but more importantly, it was inadmissible as to Appellant [see Argument III]. And in this Commonwealth, the testimony of accomplices cannot be corroborated by evidence furnished by another accomplice. Goodin v. Commonwealth, 256 Ky. 1, 75 S.W.2d 567 (1934).

One final point should be made. This Court has always adhered to the rule that one's mere presence at the scene of a crime is not evidence that such person committed the crime or aided in its commission. Rose v. Commonwealth, Ky., 385 S.W.2d 202 (1964).

The rule is that a conviction is not justified by suspicion and evidence of relationship among the accused persons or by their mere association at a time when a crime was committed by one of them. Moore v. Commonwealth, Ky., 282 S.W.2d 613, 614 (1955). "Mere acquiescence in, or approval of, the criminal act, without cooperation or agreement to cooperate in its commission, is not sufficient to constiture one an aider and abettor." Warfield v. Commonwealth, Ky., 334 S.W.2d 913, 914 (1960).

It is a recognized legal principle that "[g]uilt may not be established . . . by proof of the association of an accused with the perpetrators of a crime both before and after its commission." Commonwealth v. Truglio, Ky., 371 S.W.2d 648, 650 (1963). Mere assocation, though it may create a suspicion, is not enough to prove criminal consort. Perkins v. Commonwealth, Ky., 409 S.W.2d 294 (1966).

In the case sub judice, the only evidence which tended to connect Appellant with the charged offenses was the testimony of the two accomplices, Derrick Clark and Carlethia Majors. Since no other competent evidence was introduced to corroborate the testimony of the two accomplices, the trial judge was required to grant defense counsel's motion and direct a verdict of acquittal. RCr 9.62; Hartsock, supra.

Accordingly, this Court should reverse the judgment below.

II.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY FAILING TO INSTRUCT THE JURY THAT APPELLANT'S CODEFENDANT WAS AN ACCOMPLICE WHICH NECESSITATED CORROBORATION OF THE CODEFENDANT'S TESTIMONY.

As previously explained, a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect defendant with the commission of the offense. RCr 9.62.

Appellant submits that codefendant Peterson was an accomplice in the case at bar, and it was reversible error for the trial court not to instruct the jury that codefendant Peterson's testimony required corroboration.

An accomplice has been defined as:

> . . . one who knowingly, voluntarily, and with common intent, unites with the principal in the perpetration of the crime, either by being present and joining in the criminal act, by aiding and abetting in its commission, or, if not present, by advising and encouraging the performance of the act . . . . Magruder v. Commonwealth, Ky., 281 S.W.2d 716, 719 (1955).

To determine whether one is an accomplice, the evidence showing participation in or connection with the offense should be weighed to see if it is sufficient to convict such person either as a principal or as an aider and abettor. Head v. Commonwealth, Ky., 310 S.W.2d 285 (1958).

The evidence in the case sub judice clearly showed that codefendant Peterson could have been convicted as either a principal or as an aider and abettor. Peterson, himself, testified that he gave the gun that fired the fatal shot to Clark (T.E., Vol. IV, p. 469); also Peterson stated that Carlethia Majors gave him money that Carlethia had taken off the deceased (T.E., Vol IV, p. 482). Finally, Teresa Barnes testified that Peterson brought a sack of bullets to her apartment on the night of the shooting (T.E., Vol. III, pp. 303-304).

Accordingly, codefendant Peterson, by his participation in the alleged shooting and robbery, was an accomplice as a matter of law. See Hammershoy v. Commonwealth, Ky., 408 S.W.2d 624 (1966). Therefore, the lower court should have instructed the jury to that effect. See Mouser v. Commonwealth, Ky., 491 S.W.2d 821 (1973).

The fact that Peterson was a codefendant did not keep him from being designated as an accomplice. Howard v. Commonwealth, Ky., 487 S.W.2d 689, 690 (1972). Further, the fact that Peterson was found not guilty did not change his status as an accomplice.

Even assuming arguendo that there was reasonable doubt as to whether Peterson was an accomplice, the jury should have determined the question under a proper instruction. Mouser, supra at 823.

In the case at bar, there was no overwhelming corroboration of the accomplices' testimony. Neither was Appellant's guilt established by independent and substantial evidence of a competent nature. Therefore, in view of the "scanty evidence" offered to corroborate the accomplies' testimony, it was "highly prejudicial" for the trial court not to have told the jury that codefendant Peterson's testimony required corroboration. Rue v. Commonwealth, Ky., 347 S.W.2d 75 (1961).

Appellant submits that because the trial judge failed to instruct the jury that Peterson was an accomplice, and that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence, the jury was allowed to render a verdict of guilty based solely upon the accomplice's account of what transpired.

While it is true that Appellant's counsel did not request such an instruction, this Court should still review this error and grant appropriate relief. This is because

the failure of the trial judge to instruct the jury, sua sponte, that the uncorroborated testimony of accomplices is not sufficient evidence to sustain Appellant's conviction created "a manifest injustice."

In Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970), this Court acknowledged that an appellate court, if it believes there may have been a miscarriage of justice, should exercise its extraordinary power and reverse the judgment below even though the specific error was never presented to the trial court.

In the case sub judice, no instruction on corroboration or that Peterson was an accomplice was given, and substantial prejudice to Appellant necessarily resulted. On the basis of this error, this Court should reverse Appellant's conviction.

III.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY FAILING TO ADMONISH THE JURY THAT THE CONFESSION OF APPELLANT'S CODEFENDANT WAS NOT COMPETENT EVIDENCE AGAINST APPELLANT.

At the suppression hearing, the Commonwealth Attorney stated that the confession of Appellant's codefendant, George Thomas Peterson, would be introduced into evidence only if Peterson took "the stand in his own defense and [made] statements that [were] inconsistent with what he had to say T.S.H., p. 18). That the confession would only be admissible to impeach Peterson's credibility was also given judicial approval by the trial judge at the hearing (T.S.H., p. 22).

During the joint trial, the confessing codefendant took the stand. But because he made some inconsistent statements during his direct examination, the Commonwealth Attorney, after laying a foundation, introduced the confession of codefendant Peterson. This confession contained numerous references to Appellant, and incriminated Appellant solely in the murder and first degree robbery charged in the indictment. According to Peterson's confession, Appellant stated that he shot Brown because he had no choice because Appellant "thought the dude was going to shoot him" (T.E., Vol. IV, p. 533). Also, according to Peterson's confession, Appellant stated that he knew where he could get $400; that Carlethia was going to bring a date over to the house and Appellant was "going to take him off on the sidewalk" (T.E., Vol. IV, pp. 513-514). Peterson claimed that he went upstairs because he did not want to be involved in anything since "T [Appellant] and this young boy [Clark] [were] going to rob a dude" and there might be shooting (T.E., Vol. IV, p. 515).

When the written confession was admitted into evidence, the trial judge gave no admonition to the jury informing them that the confession was admissible only against Peterson and was not competent evidence against Appellant. Additionally, the trial judge in his instructions again failed to inform the jury that Peterson's confession was evidence only as to Peterson and could not form a basis for Appellant's conviction.

However, the prosecutor did not stop with the cross-examination of Peterson. The prosecutor also called Detectives Fryer and Linnean in rebuttal, ostensibly to detail the circumstances under which Peterson's confession was given (T.E., Vol. IV, p. 540). But once on the stand, the detectives again read the codefendant's confession (T.E., Vol. IV, pp. 551, 563), without the trial judge giving an admonition. This just reinforced the incompetent evidence as to Appellant in the minds of the jury.

As previously stated, Peterson took the witness stand and testified that he made the above statement. And he was cross-examined by Appellant's counsel. Accordingly, Appellant does not argue that he was denied confrontation under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). However, Appellant submits that the jury was allowed to use incompetent evidence, Peterson's confession, as a basis for finding him guilty of the charged offenses.

Appellant admits that this Court in Ferguson v. Commonwealth, Ky., 512 S.W.2d 501 (1974) rejected the contention that the trial court erred in not admonishing the jury that the confession of the codefendant could not be considered against the defendant since the prosecutor on cross-examination of the codefendant "laid a proper foundation in accordance with Jett v. Commonwealth, Ky., 436 S.W.2d 788, whereby the

confession became admissible as substantive evidence against [the defendant]," citing Lowe v. Commonwealth, Ky., 500 S.W.2d 67 (1973).

Appellant submits that the utilization of the Jett rule to transform the hearsay, extra-judicial confession of a codefendant into competent substantive evidence against the defendant in a joint trial is an unacceptable and improper interpretation of the fundamental evidentiary principle embodied in the Jett decision.

In Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969), this Court said:

> That the out-of-court statement is hearsay, and not given under oath, is the traditional reason why it is generally held not admissible as substantive testimony. Id., at 791.

The rationale of the Jett rule was extracted from the evidentiary theory set forth by text writers such as Wigmore who said:

> It does not follow, however, that prior self-contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the hearsay rule. But the theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination. Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of courtrooms is in accord. 3A Wigmore, Evidence §1018 (Chadbourn rev. 1970). [My emphasis added.]

Utilizing this rationale, this Court held in the Jett decision, supra:

> When both the person who is said to have made the out-of-court statement and the person who says he made it appear as witnesses under oath and subject to cross-examination there is simply no justification for not permitting the jury to hear, as substantive evidence, all they both have to say on the subject and to determine wherein lies the truth. . . . Id., at 792.

Thus, the holding in Jett addressed the aspect of the hearsay rule which forbids the use of extrajudicial utterances as credible testimonial assertions. Significantly, this is not the same aspect of the hearsay rule which precludes the use of a defendant's confession as admissible evidence against his codefendant at a joint trial. In dealing with the admissibility of the confession of a codefendant, Wigmore has written:

> . . . It follows that the statements of one who is confessedly a distinct person B do not become receivable as admissions against A merely because B is also a party. In other words, the admissions of one coplaintiff or codefendant are not receivable against another, merely by virtue of his position as a coparty in the litigation.
>
> . . . .
>
> The principle is particularly illustrated by the rule in regard to the admissions of a codefendant in a criminal case; here it has always been conceded that the admission of one is receivable against himself only. 4 Wigmore, Evidence §1076 (Chadbourn rev. 1972). [My emphasis added].

In Bruton, supra, Justice White, in his dissenting opinion, explained the policy reasons behind the portion of the hearsay rule that precludes the use of a defendant's confession as competent evidence against his codefendant.

> . . .As to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. Furthermore, the codefendant is no more than an eyewitness, the accuracy of whose testimony about the defendant's conduct is open to more doubt than would be the defendant's own account of his actions. More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. . . . Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable. Id., 88 S.Ct. at 1630-1631.

Summarizing these defects of credibility which where in a codefendant's confession, Justice White notes that "the codefendant's admissions cannot enter into the determination of the defendant's guilt or innocence because they are unreliable." Id., 88 S.Ct. at 1631.

The underlying basis for declaring the confession of one defendant "presumptively unreliable" evidence as to the guilt of a codefendant is the confessor's real motivation to exonerate himself by implicating his codefendant. Such a motivation is not removed by the prosecutor asking the defendant who confessed enough questions on cross-examination to set a proper foundation for impeaching him.

In Nelson v. O'Neil, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971), the Supreme Court was faced with a situation where the confession of the codefendant was admitted into evidence. In the cited case, O'Neil and his codefendant, Runnels, were tried in a joint trial in a California state court at which Runnels' extra-judicial confession implicating himself and O'Neil was admitted. The trial judge ruled the police officer's testimony as to the substance of Runnels' alleged confession was

admissible against Runnels, but admonished the jury that it could not be considered as evidence against O'Neil. Runnels, during the defense portion of the trial, took the stand and denied ever making such a confession. O'Neil's counsel did not question Runnels although he was fully free to do so. The Supreme Court noted that:

> Runnels' out-of-court confession implicating the respondent was hearsay as to the latter, and therefore inadmissible against him under state evidence law. The trial judge so ruled, and instructed the jury that it must not consider any part of the statement in deciding whether or not the respondent was guilty. Id., 91 S.C. at 1725, 1726.

Although no denial of the constitutional right to confrontation was found since Runnels had taken the stand on his own behalf, the Supreme Court did observe that the co-defendant's out-of-court confession is hearsay as to the defendant so that it's admission against the defendant, in the absence of a cautionary instruction, would be reversible error under California state law. Significantly, California has the same evidentiary rule as that set forth in the Jett decision. See California v. Green, 399 U.S. 149, 90 S.Ct.1930, 26 L.Ed.2d 489 (1970). Nevertheless, that evidentiary rule does not permit the confession of a codefendant to become admissible against the defendant at a joint trial simply because the codefendant testifies at that trial.

In this jurisdiction, it is a well-established legal principle that where two parties are jointly indicted, the confessions of one are not admissible in evidence against the other. Frost v. Commonwealth, 48 Ky. 362, 9 Mon. 362 (1849). A confession by a codefendant, not made in the presence of the defendant, is hearsay as to the defendant and is inadmissible. Ray v. Commonwealth, Ky., 284 S.W.2d 76 (1955).

In Benson v. Commonwealth, Ky., 463 S.W.2d 122 (1971), this Court noted that one of the requirements under the Jett rule for admission of a prior inconsistent statement "is that the contents of the statement would be admissible if the declarant had so testified." Id., at 124. Obviously then, if other evidentiary restrictions render the testimony inadmissible, the mere fact that a foundation for impeachment in accordance with CR 43.08 has been laid will not make the testimony competent.

In the case at bar, Peterson's confession would have been inadmissible against Appellant at a separate trial. However, by pursuing a joint trial, the prosecutor insures that he will be able to place Peterson's confession which incriminates Appellant before the jury. And in the event that Peterson elects to testify in his own behalf, the prosecutor may, under this application of the Jett rule, question Peterson concerning the circumstances attendant to his confession, and, thus convert inadmissible, unreliable evidence into competent evidence upon which the jury may base Appellant's conviction.

This interpretation of the Jett principle is not in conformity with the great text-writers, and should not be allowed to stand.

Finally, Appellant submits that the principle that a codefendant's confession is inadmissible hearsay as to the defendant is so fundamental, elementary, and ingrained in our evidentiary law that it has acquired a constitutional status. See Chamber v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), where the declaration against interest exception to the hearsay rule was given constitutional status.

In United States v. Maddox, 492 F.2d 104 (5th Cir. 1974), the Court of Appeals analyzed a factual situation remarkedly similar to the case at bar. In the cited case, Maddox

and his codefendant, Knowles, were tried in a joint trial at which Knowles" extra-judicial confession was admitted. Knowles, during the defense of the trial, took the stand and said the statement was coerced. Although Maddox's right of confrontation was not denied, the court stated:

> . . .Of course Bruton does not hold that such evidence becomes admissible against a non-declaring codefendant. . .merely because he receives confrontation and the right to cross-examination. Bruton would indicate however, that upon confrontation and cross-examination a Delli-Paoli instruction would be sufficient to protect a non-declaring defendant against prejudice so that the evidence could be admitted against the maker of the statement. . . .Id., at 108. [My emphasis added].

In the instant case, the statement of Peterson did not become admissible against Appellant merely because he received confrontation and cross-examination, but since he received confrontation and cross-examination, an admonition that the confession was only to be considered against the confessing codefendant was the only effective way to protect Appellant against prejudice. Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957); Maddox, supra; Peek v. Commonwealth, Ky., 415 S.W.2d 854 (1967).

While it is true that Appellant's counsel did not request such an admonition at the time the confession was introduced, this Court should still review this error and grant appropriate relief.

In Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970), this Court acknowledged that an appellate court, if it believes there may have been a miscarriage of justice should exercise its extraordinary power and reverse the judgment below even though the specific error was never presented to the trial court. Because there was no overwhelming competent evidence against

Appellant, it is beyond dispute that the jury used the confession to convict Appellant of both charges. The failure of the trial court to admonish the jury that Peterson's confession was not evidence which could be used against Appellant created a "manifest injustice."

Since Appellant was substantially prejudiced when his codefendant's confession which incriminated Appellant was introduced and considered by the jury without a cautionary admonition that such evidence could not be used to support a finding of guilty against Appellant, this Court must now reverse his conviction.

IV.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION FOR SEVERANCE BECAUSE THE DEFENSES OF APPELLANT AND HIS CODEFENDANT WERE ANTAGONISTIC AND THE CONFESSION OF APPELLANT'S CODEFENDANT TENDED TO DIRECTLY INCRIMINATE APPELLANT.

Prior to trial, Appellant filed a motion to sever his trial from that of his codefendant (T.R., p. 16). At a suppression hearing, Appellant through counsel informed the trial judge that certain statements the codefendant made were prejudicial to Appellant (T.S.H., p. 9). Also counsel for Appellant's codefendant stated that the two defendants had "considerably divergent defenses" (T.S.H., p. 10). Although the court did not rule on the separate trial motion during the suppression hearing (T.S.H., pp. 34-35), the fact that Appellant and Peterson were tried together shows that the motion was denied. Therefore, this error was sufficiently brought to the lower court's attention to be preserved for appeal.

It is established law in Kentucky that if it appears that a defendant will be prejudiced by a joinder of defendants

for trial,RCr 9.16 requires the trial court to grant separate trials. Hardin v. Commonwealth, Ky., 437 S.W.2d 931, 933 (1969). Ordinarily, the fact that the defendants had antagonistic defenses or "the evidence as to one defendant tends directly to incriminate the other, e.g., one defendant's admission directly incriminated the other" were sufficient to establish such prejudice as to require separate trials. Hoskins v. Commonwealth, Ky., 374 S.W.2d 839, 842 (1964); Tinsley v. Commonwealth, Ky., 495 S.W.2d 776, 780 (1973).

More recently, however:

> . . .That the defenses of jointly indicted persons may be, in some respects, antagonistic or that the testimony of one or both of them may directly implicate the other are only factors for the trial judge to consider in making his determination as to whether the defendants will be prejudiced by a joint trial. . . . Rachel v. Commonwealth, Ky., 523 S.W.2d 395, 400 (1975).

And this Court will only reverse if it is convinced that prejudice occurred by the joint trial.

Appellant submits that the trial court clearly abused its discretion in this case by not granting separate trials. Appellant's basic defense was that of an alibi. However, counsel for Appellant's codefendant attempted to discredit Appellant at every opportunity by showing that Peterson did not want to be associated with Appellant anymore (T.E., Vol. II, p. 293). Also Appellant's codefendant attempted to emphasize facts exculpatory of himself- "I said call the police (T.E., Vol. IV, p. 477) - and condemnatory of Appellant. But the confession of codefendant Peterson, which directly incriminated Appellant, was the major reason why the trial court should have granted Appellant's motion for severance.

The Sixth Circuit Court of Appeals has recognized that joinder is prejudicial to the defendant where a codefendant's confession is introduced into evidence. Glinsey v. Parker, 491 F.2d 337 (6th Cir. 1974). When the transcript is examined in the case at bar, it will become readily apparent that the competent evidence of Appellant's guilt was not so overwhelming that it would make the introduction of the confession only harmless error beyond a reasonable doubt. Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). Since the evidence was not overwhelming, neither can the confession be considered as just cumulative evidence. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284 (1969).

It is stated in 75 Am. Jr. 2d, Trial §23 (pp. 136-137) that:

> . . .there is authority to the effect that where a confession by one of several defendants tends to implicate others, a severance should be ordered unless the prosecutor declares that it will not be offered in evidence on the trial, or that such confession will not be offered to the jury without appropriate instructions. . . .

In the case sub judice, Appellant was in actuality, severely prejudiced by his codefendant's confession. The Sixth Circuit recently stated in United States v. Crane, 499 F.2d 1385, 1388 (6th Cir. 1974) that:

> . . .whenever there is a possibility of prejudice to either defendant, the safest course would appear to be the traditional use of the severance device.

Certainly the possibility of prejudice was clearly demonstrated to the trial court. Yet the trial judge ignored the "safest course" to Appellant's substantial prejudice.

Therefore, it is respectfully submitted that the trial court abused its discretion when it overruled Appellant's motion for a severance.

V.

THE COURT BELOW DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO CONFRONT AND DISCREDIT A WITNESS BY NOT PERMITTING APPELLANT TO CALL A WITNESS IN SURREBUTTAL.

As it has previously been mentioned, when codefendant Peterson took the stand in his own behalf, his confession was introduced into evidence. However, during the prosecutor's cross-examination, Peterson stated that what was written down by the detectives was not exactly what he told them; it was "off a little bit" (T.E., Vol. IV, p. 514). Also on cross-examination by Appellant's counsel, Peterson stated that he felt he was forced into making the statement since the detectives stated they would let Molly go if he confessed (T.E., Vol. IV, p. 537).

To rebut this evidence, the prosecutor called Detective Linnean in rebuttal. Detective Linnean stated that he never offered any leniency to Peterson or to Molly Galashaw in exchange for Peterson's statement (T.E., Vol. IV, p. 567), since Molly was never a suspect in the case (Id.). And on cross-examination by Appellant's counsel, Detective Linnean reemphasized that he never told Peterson if he talked, the charge against Molly would be dropped (T.E., Vol. IV, p. 573).

At that point, Appellant's counsel during a conference at the bench, moved that he be allowed to call Molly Galashaw as a rebuttal witness to respond to Detective Linnean's testimony (T.E., Vol. IV, pp. 573-574). This motion was overruled by the trial court (T.E., Vol. IV, p. 574). Then counsel for Appellant's codefendant placed an avowal in the record. He stated that:

> . . .we have a witness, Molly Galashaw prepared and willing to testify that she and Peterson were taken in custody in the early morning hours of the 28th, together, and that Detective Linnean stated to both of them that they were both suspects and that if the defendant Peterson cooperated in making a statement, that Molly Galashaw would not be charged with any crimes and that the defendant Peterson thereupon gave such statement. . . .(T.E., Vol. IV, p. 575).

Then Appellant's counsel moved for a mistrial (Id). Therefore, this error was clearly preserved for appellate review.

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. Embedded within the right of confrontation is the right to impeach and discredit the witness. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Appellant submits that denying him the right to attack the credibility of the detective by calling a rebuttal witness was constitutional error of first magnitude, and no amount of showing of want of prejudice can cure it.

This Court in Childers v. Commonwealth, 161 Ky. 440, 171 S.W. 149, 152 (1914) stated:

> . . . .when the commonwealth or the defense is allowed by the court to introduce material evidence in rebuttal, whether it be for the purpose of contradiction or as evidence in chief, the other side should also be allowed to introduce evidence to explain away or contradict this rebutting evidence. Evidence in rebuttal is just as damaging, often more so, than like evidence would be if offered in chief, and, if it would be competent to explain away or contradict the evidence if offered in chief, it would certainly be admissible to permit it to be explained away or contradicted when offered in rebuttal.

In the cited case, the Commonwealth's evidence was that the deceased was shot by his wife, her brother and her father. The defense was that when the deceased grabbed his

wife by the hair, the wife's brother shot the deceased five times. The trial court allowed the prosecutor to call two witnesses in rebuttal who testified that the mother of the defendant said "you know you had to do it," however, the court refused to allow the defendant to call witnesses in surrebuttal who would have testified that the mother made no such statements. This Court held that it was reversible error not to allow the defendant to call witness in surrebuttal. Childers, supra at 152.

Also in Shell v. Commonwealth, 245 Ky. 535, 53 S.W. 2d 954 (1932), this Court again reversed the judgment of the lower court because the trial court failed to allow the defendant to call a witness in surrebuttal. In the cited case, the defendant put on evidence that the night before the killing of Jones, he and Jones had a fight; and on the night of the murder, Jones came looking for him with a gun. The prosecutor called Nannie Jones who testified in rebuttal that she searched Jones and he had no pistol. This Court stated:

> . . .The court should have allowed Maxine Beets, who was called in sur-rebuttal, to testify that she was present at the time and that Nannie V. Jones made no search. . . .Id., 53 S.W.2d at 956.

In the case sub judice, the trial court should have allowed Appellant to call Molly Galashaw to testify that Peterson only gave the statement because the detectives stated they would drop the charges as to Molly. But by not allowing the defendant to put on a rebuttal witness, the jury got the impression that Detective Linnean was telling the truth and that there was no coercion. The proposed testimony of Molly was clearly competent rebuttal evidence since it was a denial of an affirmative fact that the prosecutor was trying to prove. Keene v. Commonwealth, 307 Ky. 308, 210 S.W.2d 926 (1948).

Although the testimony of Molly is technically denominated as re-rebuttal or surrebutal, under the circumstances of this case it only amounted to rebuttal testimony. The codefendant's confession only was introduced into evidence when Peterson took the stand. Therefore, the only opportunity to counter what Detective Linnean said was by calling a rebuttal witness.

Since the trial court deprived Appellant of his constitutional right to discredit a witness, this Court must now reverse his conviction.

VI.

THE JURY VERDICT WAS INCONSISTENT IN FACT AND LAW AND, CONSEQUENTLY, DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The evidence for the prosecution showed that on the night of January 25, 1975, two men grabbed William Brown as he was entering the apartment on Sixth Street. When Brown failed to give the two assailants any money, Brown was shot. This single course of conduct spawned two charges being placed against Appellant - murder and robbery in the first degree in violation of KRS 507.020(1) and KRS 515.020(1)(b), respectively.

However, the jury found Appellant guilty not of murder, but manslaughter in the second degree and guilty of robbery in the first degree (T.E., Vol. V, p. 648). The conviction of Appellant for manslaughter in the second degree was a determination that Appellant's mental state was that of "wantonness." KRS 507.040. The conviction for first degree robbery was a determination that Appellant's mental state was that of "intention." KRS 515.020(1)(b).

Appellant submits that no one could have two mental states at one split instant; therefore, the two verdicts returned by the jury are not only inconsistent, but factually and legally contradictory which requires a reversal of the conviction with instructions that a new trial must be ordered.

In United States v. Bethea, 483 F.2d 1024 (4th Cir. 1973), the Fourth Circuit was confronted with a situation where the jury returned inconsistent verdicts. In the cited case, the defendant was convicted on charges of failure to report for induction, failure to keep his local draft board advised of his current address, and failure to report for an armed forces physical examination. The federal court analyzed that in order to convict on the first and third counts the government had to establish that the defendant had received notice of the orders to report. However, to establish the second count, the defendant's failure to keep the local draft board advised of his current address, the government had to prove that due to the defendant's failure to carry out his duty the draft board did not know his whereabouts. The Fourth Circuit explained the contradiction:

> Here, appellant's guilt or innocence on all counts depended upon the jury's resolution of one factual question -- was the North Carolina address to which the orders were sent a "good" address? If it was "good" conviction on count two was impossible; if it was not "good" conviction on counts one and three was impossible. Assuredly, conviction on all three counts was not logically possible. . . . Id., at 1030.

The court, after determining that the verdicts contradict, reversed all the convictions of the defendant and ordered a new trial.

In the case sub judice, finding Appellant guilty of manslaughter is the second degree negatives some fact, i.e. Appellant's mental state, essential to finding Appellant guilty of first degree robbery. Therefore, the verdicts cannot stand. United States v. Daigle, 149 F.Supp. 409 (D.C.D.C. 1957).

Since the jury verdicts were inherently inconsistent or contradictory, this Court must now reverse Appellant's conviction and remand for a new trial. United States v. Gaddis, 506 F.2d 352 (5th Cir. 1975).

VII.

THE JUDGMENT OF THE LOWER COURT WAS ERRONEOUS SINCE IT WAS NOT IN CONFORMITY WITH THE VERDICT RETURNED BY THE JURY.

As has previously been mentioned, Appellant was indicted for murder and first degree robbery in violation of KRS 507.020(1) and KRS 515.020(1)(b), respectively. The lower court instructed the jury on first degree robbery in Instruction I (T.E., Vol. IV, pp. 584-585), murder in Instruction II (T.E., Vol. IV, pp. 585-586), second degree manslaughter in Instruction III (T.E., Vol. IV, pp. 586-587), and reckless homicide in Instruction IV (T.E., Vol. IV, p. 587).

The jury, after deliberation, returned a verdict of guilty under Instruction I which was first degree robbery and fixed punishment at twenty years (T.E., Vol. V, p. 648), and the jury found Appellant guilty under Instruction III which was manslaughter in the second degree and fixed his punishment at ten years (Id.). The lower court then accepted

the verdict (T.E., Vol. V, p. 649).

However, the judgment returned by the court stated that Appellant was given twenty years for murder (T.R., p. 94), and ten years for robbery in the first degree (Id.). This was erroneous, not only because Appellant was convicted of manslaughter in the second degree, but also because the judgment reversed the punishments awarded by the jury.

Therefore, this Court, sua sponte, should conform the judgment of the lower court to accurately reflect the verdict that was returned by the jury.

VIII.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ADMITTING INTO EVIDENCE, OVER DEFENSE OBJECTION, PHOTOGRAPHS OF THE DECEASED WHICH WERE INFLAMMATORY AND WITHOUT SIGNIFICANT PROBATIVE VALUE.

Detective Raymond Chappel testified that when he arrived at the scene, the victim's body was:

> . . . lying inside the door. His feet were sticking where you could see them from the street and his head was beside a gas meter up in the corner . . . (T.E., Vol. I, p.80).

At this point, counsel for Appellant in anticipation of the prosecution's introduction of the photographs of the deceased objected to the photographs being introduced (T.E., Vol. I, p. 80). The reasons advanced for the objection were that the photographs were "inflammatory" and without "probative value" since Detective Chappel had just described the position of the body (T.E., Vol. I, pp. 80-81).

This objection was overruled (T.E., Vol. I, p. 81), and Detective Chappel began to explain two of the four photographs of the deceased. Detective Chappel said that the first photograph (Exhibit 9) showed the position of the deceased in the left front corner of the apartment (T.E., Vol. I, p. 86). The trial court overruled Appellant's counsel continuing objection (T.E., Vol. I, p. 87). According to Detective Chappel the second photograph (Exhibit 10) was a close-up view of the deceased (Id.). This photograph was also objected to, but overruled (Id.).

Officer Robert Hutchinson testified that he went to the Cunningham Funeral Home at 10:30 P.M. to take photographs of the deceased (T.E., Vol. I, p. 92). At this point, Appellant's counsel again objected to any photographs being introduced since they had "no probative value," and were

"repetitious" (Id.). When the trial court overruled the objection (T.E., Vol. I, p. 93), Appellant's counsel moved for a mistrial since the photographs had no probative value and were inflammatory (Id.); this motion was in turn overruled (Id.).

Officer Hutchinson testified that the third photograph (Exhibit 11) showed "the victim lying on a stretcher" with a small hole in the lapel of his jacket from the pistol shot (T.E., Vol. I, p. 94). This was introduced over the objection of Appellant's counsel (Id.). Finally, Detective Hutchinson stated that the fourth photograph (Exhibit 12) showed a puncture wound "in the upper chest area" of the deceased (T.E., Vol. I, p. 95). Again this photograph was introduced over the objection of Appellant's counsel (Id.).

This Court in Poe v. Commonwealth, Ky., 301 S.W.2d 900 (1957), said that:

> . . . The introduction of gruesome photographs, bloody clothing, and the like is almost inevitably accompanied by the risk of inflaming the minds of the jurors to the prejudice of the accused. Where necessary to prove a contested relevant fact, their probative value is usually held to outweigh any possible prejudicial effect they might have. But where the facts sought to be proved by the possibly prejudicial evidence are admitted by the defense, it is difficult to understand what probative value (other than as cumulative evidence) such evidence might have. . . . Id., at 902-903.

It is still difficult to ascertain, in the case sub judice, the purposes for which the photographs of the scene were introduced since Detective Chappel established the position of the body. Under such circumstances, the photographs of the scene appear unnecessary, irrelevant, and calculated to inflame the jury.

The remaining photographs which were taken at the funeral home to illustrate the chest wound were not relevant since the cause of death, which they presumably related, was established by the testimony of Dr. Young. Therefore, since these pictures served no useful purpose, they should not have been admitted. Milan v. Commonwealth, Ky., 275 S.W.2d 921, 923 (1955).

Because the four photographs had no probative value, their introduction into evidence served only to inflame and prejudice the minds of the jurors agianst the Appellant. Under this onerous burden, the jury could not have rendered a fair and impartial verdict. The prejudice inflicted by the trial court in admitting such evidence can only be purged by granting Appellant a reversal of his conviction.

IX.

THE CUMULATIVE EFFECT OF THE PRECEDING EIGHT ERRORS SUBSTANTIALLY PREJUDICED APPELLANT'S TRIAL AND DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Assuming arguendo that this Court declines to hold any individual, assigned error sufficient to require the reversal of Appellant's conviction, Appellant submits that the cumulative effect of the eight preceding errors requires that the conviction below be set aside and a new trial ordered.

Appellant was convicted on uncorroborated testimony of two accomplices. Also the confession of Appellant's co-defendant was admitted into evidence without a cautionary admonition by the trial court that this confession was not admissible against Appellant.

Further, the trial court deprived Appellant of the opportunity to discredit a witness, allowed photographs of the deceased to be introduced into evidence, and allowed inconsistent verdicts to stand.

As a result of all eight errors, whether preserved or not, Appellant's right to a fair trial was subverted and due process denied.

Insisting that the requirements of "fundamental fairness" must be observed in all criminal trials, the Supreme Court in Chessman v. Teets, 354 U.S. 156, 77 S.Ct. 1127, L L.Ed.2d 1253 (1957) stated:

> . . . On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question. . . . Id., 77 S.Ct. at 1132.

Accordingly, on the basis of the cumulative effect of the assigned errors, this Court must reverse Appellant's conviction and order a new trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the judgment of the lower court be reversed.

Respectfully submitted,

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